Office-Supreme Court, U.S.
FILED
FEB 25 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-1211

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

THOMAS M. NORMINTON and LEVY & NORMINTON,

Petitioners,

v.

THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT,

Respondent.

REAL PARTIES IN INTEREST BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Real Parties in Interest, Defendants Betty H. Harris, Joann Ruden and Erwin Okun, respectfully request that the Court deny the Petition for Writ of Certiorari. This case does not require review of the right and universal practice of both state and federal appellate courts to impose sanctions on attorneys who abuse the appellate process. The case is simply one where the California courts, under express statutory and rule authority,[1] (not referred to in the

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(1) California Code of Civil Procedure §907. [Costs on frivolous or delaying appeal.] When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just.

California Rules of Court 26(a): [Right to costs] Except as hereinafter provided, the prevailing party shall be entitled to his costs on appeal as an incident to the judgment on appeal... Where the appeal is frivolous or taken (Footnote continued)

Petition), have, after a hearing, imposed a penalty upon attorneys for prosecuting an appeal which even the Petition concedes was objectively frivolous. The California rule is consistent with those laid down by this Court.

Petitioners do not frontally attack California Code of Civil Procedure §907 and did not do so even in their Petition for Hearing in the California Supreme Court. It is also questionable that the Petitioners have preserved the questions they seek to raise. As the Petition admits (p. 14), the questions were raised for the first time in their Petition for Hearing in the California Supreme Court,

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solely for the purpose of delay... the reviewing court may impose upon offending attorneys or parties such penalties, including the withholding or imposing of costs, as the circumstances of the case and the discouragement of like conduct in the future may require.

because, allegedly, the Notice of the Order to Show Cause (OSC) (reproduced at p. 15 of Appendix A to the Petition) "did not indicate that Respondent [the Court of Appeal] contemplated assessing sanctions because it believed Plaintiff's appeal, although advanced in good faith, was objectively frivolous."(2) (Petition p. 14.) The OSC, however, specifically cited to California Code of Civil Procedure §907 and to In Re Marriage of Flaherty, 31 Cal.3d 637, 183 Cal.Rptr. 508, 646 P.2d 179 (1982), and Flaherty, as shown infra, is categorical that a finding of bad faith is not required for the imposition of sanctions for an objectively frivolous appeal. In short, we do not believe that Petitioners raised these questions at the first opportunity.

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(2) The Court below in fact expressly declined to find on the issue of good or bad faith.

Herndon v. Georgia, 295 U.S. 441, 445-446 (1935).[3] Cf. McGoldrick v. Compagnie Gen. Transatlantique, 309 US 430, 434-5 (1940), and Bloeth v. New York, opinion in chambers of Mr. Justice Harlan, 7 L.Ed.2d 780, 82 S.Ct. 661 (1962).

The case simply does not qualify for review under 28 USC 1257 and Rule 17. We briefly address the merits.

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(3) "Appellant, of course, cannot plead ignorance of the ruling in the Carr Case, and was therefore bound to anticipate the probability of a similar ruling in his own case, and preserve his right to a review here by appropriate action upon the original hearing in the court below. It follows that his contention that he raised the federal question at the first opportunity is without substance, and the appeal must be dismissed for want of jurisdiction." (Herndon, 295 US at 446).

The Carr Case in Herndon corresponds with the Flaherty case here, although in Flaherty the appeal was not held to be frivolous.

HISTORY OF THE CASE

The Petition for Certiorari obscures the particular facts of this case:[4]

In 1981, after a full hearing on the merits, the California Supreme Court issued its opinion and a Writ of Mandate ordering the Los Angeles Superior Court to sustain without leave to amend the general demurrers of the defendants to the libel causes of action in Maple Properties' ten count Complaint and to

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(4) The case below was Maple Properties, a Limited Partnership, v. Harris, et al., in the Los Angeles Superior Court, Case No. C 299 570. The opinion of the California Court of Appeal (158 Cal.App.3d 997, 2 Cal.Rptr. 532, Appendix A to Petition) and Petitioners' Petition for Hearing to the California Supreme Court bore the same caption. The Petition for Writ of Certiorari is now captioned Thomas M. Norminton and Levy & Norminton, Petitioners, v. The Court of Appeal of the State of California, and does not contain the names of defendants-real parties in interest.

dismiss those causes. Okun v. Superior Court, 29 Cal.3d 442, 175 Cal.Rptr. 157, 629 P.2d 1369 (1981). The California Supreme Court stated:

> "On the sustaining of demurrers to the second, third, fifth, and sixth causes of action should plaintiff be given leave to amend? Sufficiency of the second, third, and fifth causes turns on the presence of libel in two letters and a ballot argument. Each of those documents is nonlibelous when read in light of circumstances alleged here that would have to be considered even if omitted from an amended pleadings (Reichert v. General Ins. Co. (1968) 68 Cal.2d 822, 836-837 [69 Cal. Rptr. 321, 442 P.2d 377]). Accordingly, leave to amend those three causes should be denied because 'there are no circumstnaces under which an amendment would serve any useful purpose' (Routh v. Quinn (1942) 20 Cal.2d 488, 493-494 [127 P.2d 1, 149 A.L.R. 215]) and 'speedy resolution of cases involving free speech is desirable' to avoid 'a chilling effect upon the exercise of First Amendment rights' (Good Government, supra, 22 Cal.3d at 685)." (29 Cal.3d at 460).

A Petition for Rehearing, in which Maple Properties argued that it should be given leave to amend the libel causes, was denied. A Petition for Writ of Certiorari was then denied. 454 U.S. 1099 (1981). All of this occurred almost four years ago.

In 1982 the Superior Court complied with the California Supreme Court's Mandate and entered an Order sustaining the general demurrers to the libel causes without leave to amend. After further proceedings, the Superior Court dismissed the case. In 1984, on the subsequent present appeal from the Order of Dismissal, Maple Properties reargued at length the alleged merits of all of its causes of action, including the libel causes which the prior opinion and Order of the California Supreme Court precluded it

from doing. Petitioners' briefs repeated the arguments which had been previously made to and categorically rejected by the California Supreme Court. As found by the California Court of Appeal, a significant, material and severable portion of Maple Properties' appeal was frivolous and was so beyond any argument:

> ". . . the invalidity of these claims was conclusively adjudicated by our Supreme Court [in this very case] . . . '[the appeal] indisputably has no merit -- . . . any reasonable attorney would agree that the appeal is totally and completely without merit.'" (158 Cal.App.2d at 1001 and 1008, Petition Appendix A, pp. 2 and 23.)

The Court of Appeal imposed a penalty on Maple's attorneys, the Petitioners here. The California Supreme Court denied the attorneys' Petition for Hearing, and the present Petition for Certiorari followed.

A now admitted fact is particularly damning: Petitioners argued below that they were permitted to avoid the unequivocal mandate of the California Supreme Court in Okun and permitted to reargue the sufficiency of their libel causes because they had allegedly "discovered new facts" since the Okun opinion. However, the alleged "new facts" had been placed into the record in the trial court in 1981 by Petitioners themselves before the opinion by the California Supreme Court in Okun; Petitioners had argued precisely those facts in their briefs in the California Supreme Court in 1981.(5)

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(5) This was pointed out at length by Real Parties in their briefs in the Court of Appeal, but Petitioners continued to make their "newly discovered facts" argument, including in their response to the Order to Show Cause. Petitioners admitted that the alleged facts were not "newly discovered," only in their reply and final papers on the OSC. [See opinion below, 158 Cal.App.3d at 1004 and 1009, pp. 10-12 and 23-25 of Appendix A to Petition.)

Further, Petitioners had argued for almost 5 years that Maple Properties' constitutional rights had been violated and that it had suffered over $62,000,000.00 general and special damages. (Prayer to Maple Properties' Complaints). In addition to the named defendants, 1,000 Does, all identified as citizens and voters of Beverly Hills, were made defendants. Yet Petitioners did not even appear in the appellate court to argue the cause on the merits. The question as presented on page 2 of the Petition is thus obviously distorted, as the Court of Appeal expressly refused to determine that Petitioners acted in good faith. (158 Cal.App.3d at 1009, Petition, Appendix A, page 25) (6)

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(6) The Petition (p. 27) erroneously states that ". . . the Respondent imposed sanctions where the only evidence, in the form of declarations filed by Petitioners, demonstrated the good (Footnote continued)

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. Petitioners' Generalized Invocation Of First Amendment Cases Does Not Address The Problem Of Frivolous Appeals Or The Power Of State Appellate Courts To Deal With Them.(7)

Petitioners cite New York Times v. Sullivan, 376 U.S. 254 (1964); St. Amant

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faith of Petitioners in readvocating the sufficiency of the libel claims." The Court of Appeal found that the appeal was one that no reasonable attorney could have thought to be meritorious. By itself, this is not proof of bad faith; but with other evidence it is relevant to that issue. The record shows that no new substantive arguments were advanced in support of the libel causes; the arguments made almost four years previously to the California Supreme Court were simply repeated. Petitioners' failure to appear to argue the merits of the appeal also is evidence relevant to the issue of bad faith.

(7) See also this Court's own Rule 49.2 and cases under its predecessor.

v. Thompson, 390 U.S. 727 (1968); Herbert v. Lando, 441 U.S. 153 (1979) (Petition, pp. 21-22), and rely on the actual malice standard in public official defamation cases. However, this case reaches the Court on the admitted premise that the appeal was objectively frivolous. No attack is made on that finding. Petitioners' argument would require appellate courts to engage in discovery and findings concerning the attorney's intent and state of mind. But courts are not the electorate and attorneys are not political candidates; courts decide cases and attorneys are professionals. Objective standards must apply to them. In short, the prosecution of a frivolous appeal simply does not equate with discussion concerning public officials.

Even if the defamation cases were analogous, an actual malice standard for sanctions for frivolous appeals is not required. Most defamation actions are decided on a negligence standard, not on an actual malice standard, and such is consistent with the First Amendment. The record here, of course, shows negligence as a minimum.

Petitioners' other authorities are even farther afield. United Mine Workers v. Illinois State Bar Association, 389 U.S. 217 (1967) simply held "that the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments gives petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights." (389 U.S. at 221-222.)

Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983), held that prosecution of a state court lawsuit, regardless of the plaintiff's motive, could not be enjoined by the National Labor Relations Board unless the suit lacked a reasonable basis in fact or law. Our case does not deal with the power to enjoin litigation. At p. 743 of 461 U.S., the Court states:

> Just as false statements are not immunized by the First Amendment right to freedom of speech, see Herbert v. Lando, 441 U.S. 153, 171, 60 L.Ed.2d 115, 99 S.Ct. 1635 (1979); Gertz v. Robert Welch, Inc. 418 U.S. 323, 340, 41 L.Ed.2d 789, 94 S.Ct. 2997 (1974), baseless litigation is not immunized by the First Amendment right to petition.

Appeals are part of litigation, and a baseless appeal, like any baseless litigation, is not immunized by the First Amendment right to petition. Brown v.

Hartlege 456 U.S. 45 (1982) (Petition, pp. 23-25), dealt with election law.[8] Petitioners quote this language from Brown:

> "The chilling effect of such absolute accountability for factual misstatements in the course of political debate is incompatible with the atmosphere of free discussion contemplated by the First Amendment in the context of political campaigns." (456 U.S. at 61)

But the California rule imposes no absolute accountability for factual or even legal misstatements.

This Court has long recognized the power of appellate courts to award dam-

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(8) "The question presented is whether the First Amendment, as applied to the states through the Fourteenth Amendment, prohibits a state from declaring an election void because the victorious candidate had announced to the voters during his campaign that he intended to serve at a salary less than that 'fixed by law.'" (456 U.S. at 47)

ages and sanctions for frivolous appeals or petitions without reference to the "actual malice" of the attorneys. The standard of frivolousness is an objective one for the court itself. Jenkins v. Banning, 64 U.S. 455, 457 (1860); Whitney v. Cook, 99 U.S. 607 (1879); Deming v. Carlisle Packing Co., 226 U.S. 102 (1912); Wagner Electric Mfg. Co. v. Lyndon, 262 U.S. 226 (1923); Slaker v. O'Connor, 278 U.S. 188 (1929); U.S. Supreme Court Rule 49.2 (see also former Rule 30).

The rule applied by the California courts under its state statute for the infrequent imposition of penalties for prosecuting frivolous appeals is consistent with this Court's own rule; and it is identical to the rule for award of attorneys' fees to defendants where

plaintiffs have pressed frivolous claims under the Civil Rights Act of 1964. In Chrisiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978), this Court held:

> "In sum, a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable or without foundation, even though not brought in subjective bad faith." (434 U.S. at 421)

In In Re Marriage of Flaherty, 31 Cal.3d 637, 183 Cal.Rptr. 508, 646 P.2d 179 (1982), which the California Court of Appeal followed to the letter in this case, the California Supreme Court held:

> "Thus, an appeal should be held to be frivolous only when it is prosecuted for an improper motive -- to harass the respondent or delay the effect of an adverse judgment -- or when it indisputably has no merit -- when any reasonable attorney would

> agree that the appeal is totally and completely without merit. (See Estate of Walters, supra, 99 Cal.App.2d at pp. 558-559)" (31 Cal.3d at 650)(9)

Far from penalizing an offense "not susceptible of exact definition,"(10) the California rule is clear and precise and is applied with caution. It will not inhibit advocacy, it permits the prosecution of meritless appeals and the advocacy of meritless arguments. The appeal of the libel causes here was not simply meritless, it was frivolous and objectively so. (See esp. pp. 1008-1009 of 158 Cal.App.3d, Petition Appendix A, pp. 23-25)

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(9) See lengthy extract from Flaherty reproduced by the Court of Appeal in this case, 158 Cal.App.3d at 1008-1009, Petition Appendix A pp. 20-23.

(10) Edwards v. South Carolina, 373 U.S. 227, 229 (1963). Edwards is cited at Petition, p. 26.

2. The California Rule Gives Full Play To First Amendment Rights.

Petitioners argue that this case will have a "pervasive chilling effect upon appellate advocacy" (Petition, p. 15) The argument is without merit.

This Court itself has distinguished between appeals which have no merit and appeals which are frivolous.

> "[Counsel's] role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw." Anders v. California, 386 U.S. 738, 743-44 (1967)

More recently, in Polk County v. Dodson, 454 U. S. 312, 323 (1981) the Court stated:

> "It is the obligation of any lawyer -whether privately retained or publicly appointed -- not to cloud the courts with frivolous motions or appeals."

The California Supreme Court in In Re Marriage of Flaherty 31 Cal.3d 637 (1982) examined at length the issues raised by the imposition of sanctions on attorneys for prosecuting frivolous appeals. It severely restricted the power of California appellate courts to impose such sanctions. As shown, its rule is consistent with those approved by this Court and takes full account of the to-be-avoided potential that indiscriminate use of sanctions for frivolous appeals may deter vigorous advocacy. The Flaherty opinion states:

> However, any definition must be read so as to avoid a serious chilling effect on the assertion of litigants' rights on appeal. Counsel

> and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal. An appeal that is simply without merit is not by definition frivolous and should not incur sanctions. Counsel should not be deterred from filing such appeals out of a fear of reprisals. Justice Kaus stated it well. In reviewing the dangers inherent in any attempt to define frivolous appeals, he said the courts cannot be "blind to the obvious: the borderline between a frivolous appeal and one which simply has no merit is vague indeed . . . The difficulty of drawing the line simply points up an essential corollary to the power to dismiss frivolous appeals: that in all but the clearest cases it should not be used." (People v. Sumner, supra, 262 Cal.App.2d at p. 415). The same may be said about the power to punish attorneys for prosecuting frivolous appeals: the punishment should be used most sparingly to deter only the most egregious conduct. (31 Cal.3d at 650-651)

The California Supreme Court held the appeal in Flaherty not to be frivolous, thus reversing sanctions there imposed by the Court of Appeal. (See 31 Cal.3d at 640-641 and 651.) Here, the

California Supreme Court in 1981 ruled on the merits that Maple Properties could not plead any libel causes. Okun v. Superior Court 29 Cal.3d 442 (1981). On a second appeal almost four years later, Petitioners, in the face of the Supreme Court Order, reargued the same libel issues. After examination of the record and after a hearing, the Court of Appeal determined, properly, that the appeal as to the libel causes was frivolous. The California Supreme Court then denied a hearing. We submit: it would be improvident for this Court now to hear this case. Indeed, the Petition for Certiorari is a fit subject for this Court's sanction under its Rule 49.2. Compare Maneikis v. Jordan, 678 F.2d 720, 722 (7th Cir. 1982).

CONCLUSION

The decision below creates no conflict among the nation's lower courts. It has been upheld under the California statute and Constitution and is consistent with the opinions and Rule of this Court. It requires no review here.

DATED: February ___, 1985

Respectfully submitted,

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